No. 83-1493

In The

Supreme Court of the United States

October Term, 1983

GENERAL HOSPITALS OF HUMANA, INC.,
Petitioner,

vs.

ARKANSAS STATEWIDE HEALTH COORDINATING COUNCIL, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

BRIEF IN OPPOSITION BY RESPONDENTS BAPTIST MEDICAL SYSTEM, ARKANSAS BLUE CROSS AND BLUE SHIELD, INC., AND ST. VINCENT INFIRMARY

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STATEMENT OF THE CASE

This statement is submitted pursuant to Rule 34(2) of the Rules of the Supreme Court. It is not intended to be a complete statement of this case, but is instead designed to correct several of the inaccuracies and omissions in the Petition for Certiorari filed by General Hospitals of Humana, Inc., the Petitioner herein (hereinafter "Humana").

First, Humana has presented this Court with an incomplete picture of the legal framework for health planning. Its Petition is totally devoid of any mention of Arkansas' state laws and regulations. As will be discussed more fully below, the National Health Planning Resources Development Act, 42 U.S.C. 300k, *et seq.* (hereinafter "the Federal Act") as amended, makes federal funds available to states which enact a health planning program which meets certain minimum federal guidelines.[1] Arkansas has chosen to receive these federal funds and thus has enacted appropriate legislation. Humana's Petition for Certiorari completely ignores the entire Arkansas health planning program, Arkansas Stat. Ann. §§82-2301-2316 (Repl. 1976 and Supp. 1983), the Arkansas State Health Plan, and the Arkansas Health Planning and Development Agency's Policies, Procedures and Criteria for Certificate of Need Review, Capital Expenditure Review, and New Institutional Health Services Review.[2]

Humana's discussion of the factual background involved also requires correction. Humana contends that the Arkansas Supreme Court interpreted the Federal Act to find that there was no need for Humana's proposed project. The Arkansas Supreme Court actually ruled that Humana was not entitled to a Certificate of Need because the Arkansas Health Planning and Development Agency's decision to grant a Certificate of Need to Humana was not consistent with the Arkansas State Health Plan *as required by the Arkansas Health Planning and Development Agency's own rules:*

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[1]Humana admits that not all states have chosen to enact such legislation (Humana Petition for Certiorari, p. 10).

[2]Pertinent portions of each of the foregoing are reproduced in Respondents' Appendices A-D.

> Thus it is established without substantial dispute that Humana's application . . . is contrary to the Central Arkansas Health System's Plan and to the State Health Plan. On this critical point, the State Agency's own Rule 4(d) requires that the State Health Plan be adhered to. . . .

Statewide Health Coordinating Council, et al. v. General Hospitals of Humana, Inc., et al., 280 Ark. 441, 448, 660 S.W.2d 906, 909-910 (1983), *reh. denied* 281 Ark. 98 (1983). (Humana Appendix 5a).

SUMMARY OF ARGUMENT

As a preliminary matter, Respondents wish to inform this Court that this brief will not respond to the "issues" in Humana's Petition for Certiorari. This should not be considered as an admission that any of Humana's points are valid. Respondents simply feel that any discussion of the merits of this case is inappropriate at this point because this is not a proper case for certiorari. There is no true federal question involved here. The only "federal" question has been contrived by Humana by presenting this Court with a distorted view of Arkansas' health planning program.[3] Even if this were a federal ques-

[3]It is interesting to note that even as this Petition is pending, Humana has initiated further state proceedings. On January 13, 1984, Humana made a request, pursuant to the rules of the Arkansas Statewide Health Coordinating Council, to amend the Arkansas State Health Plan and its bed need determinations so as to allow a future Humana Certificate of Need application to be "consistent with the State Health Plan" (as required by Arkansas Health Planning Development Agency Rule 4(d)).

(Continued on following page)

tion, certiorari would not lie because the Arkansas Supreme Court's decision can be sustained on adequate and independent state grounds.

REASONS FOR DENYING THE WRIT

I. This Court lacks jurisdiction over this matter because there is no federal question.

This is a State law matter. A brief explanation of the operation of the Federal Act demonstrates that this case involves no federal question and, therefore, certiorari is inappropriate. The heart of the Federal Act is 42 U.S.C. §300m(d). That section provides that if a state does not enter into an agreement with the Secretary of Health, Education, and Welfare (now Health and Human Services) to implement a state health planning program which meets the minimum standards of the Federal Act, that state will become ineligible for certain health related allotments, loans, and grants. The Federal Act does *not require* states to enact health planning laws, and this has been

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(Continued from previous page)

Also, on that date, Humana resubmitted its application for a Certificate of Need for the facility in question to the Arkansas Health Planning Development Agency, pursuant to Ark. Stat. Ann. §82-2311 and Arkansas Health Planning Development Agency rules. This application, the pertinent page of which is reproduced in Appendix B to this brief, states that:

> ". . . Should a new Certificate of Need be issued before action is taken by the U.S. Supreme Court Humana shall treat the new Certificate as superceding the old one and refrain from any further action to implement the August, 1982 CON."

recognized by a number of Courts. For example, the Court in *Greater St. Louis Health Systems Agency v. Teasdale*, 506 F. Supp. 23, 27 (E.D. Mo. 1980) noted:

> It is critical to note for purposes of this action that the Act did not constitute a mandatory regulation; it merely established an optional program which a state must implement if that state wishes to take advantage of the federal funds allocated by the Act. Id. at 27.

See also, Goodin v. State of Oklahoma, 436 F. Supp. 583 (W.D. Okla. 1977); *State of North Carolina v. Califano*, 445 F. Supp. 532 (E.D. N.C. 1977), *judgment aff'd*, 435 U.S. 962 (1978).

In order to become eligible for federal monies, Arkansas adopted a health planning program with appropriate laws and regulations. *See* Ark. Stat. Ann. §§82-2301-2316 (Repl. 1976 and Supp. 1983); Arkansas State Health Plan; and the Policies, Procedures and Criteria for Certificate of Need Review, Expense Review and New Institutional Health Services Review of the Arkansas Health Planning and Development Agency[4]. The language of the Arkansas health planning law and regulations is virtually identical to the language of the law and regulations of the Federal Act.

Since a state is free to either enact a state health planning program or not, the question of a *state* court interpreting the requirements of the Federal Act cannot arise in a certificate of need review once the state has

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[4]This Court should take note that although Humana has cited *none* of these in its Petition for Certiorari, it cited the Arkansas law and regulations extensively in proceedings before the Arkansas Supreme Court and at all other levels below.

enacted its own health planning program. This is because the Federal Act merely sets out minimum standards which a state health planning program must meet in order to be eligible for federal monies.[5] The State then enacts health planning laws and regulations; these State laws and regulations govern Certificate of Need questions. Humana's argument that the Arkansas Supreme Court's decision violates the Federal Act is thus unsound. The only possible federal question is whether the Arkansas program complies with the federal guidelines sufficiently to make Arkansas eligible for federal funds. This obviously has nothing to do with Humana's eligibility for a Certificate of Need and is not an issue in this case.

Humana's contention that this case involves a federal question is an apparent attempt to take advantage of the virtual identity in language between the Federal Act and the Arkansas health planning program.[6] However, the plain fact is that Certificate of Need litigation is not unusual and Certificate of Need cases routinely rely upon state law. *See, e.g. In re: Certificate of Need Application*

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[5]Humana acknowledged this in its Petition for Rehearing to the Arkansas Supreme Court. There Humana stated:

> By its decision the [Arkansas Supreme] Court has removed discretion in Certificate of Need matters from the state agency. . . . By doing so, the Court has endangered all federal funding for health planning in the state of Arkansas. (Humana Petition for Rehearing, p. 7)

[6]Humana admits that many states have health planning programs which make these states eligible for federal funds but whose language is not identical to that of the Federal Act (Humana Petition for Certiorari, p. 10). Would Humana seriously argue that a state court passing on a Certificate of Need application in those states interprets the Federal Act?

by the Bethany Medical Center, 230 Kan. 201, 630 P. 2d 1136 (1981); *Tarpon Springs General Hospital v. Office of Community Medical Facilities, Department of Health and Rehabilitative Services,* 366 So. 2d 185 (Fla. App. 1979); *State v. Sisters of Charity of Leavenworth Health Services Corporation,* 227 Kan. 53, 605 P. 2d 100 (1980). Probably the best example of the state law nature of this type proceeding is found in *Palmetto General Hospital, Inc. v. State Department of Health and Rehabilitative Services,* 333 So. 2d 531 (Fla. App. 1976). In that case, the principal contention was that the particular project in issue was exempt from certificate of need requirements. The Florida court stated:

> While it is true that the petitioner fits the foregoing exemptions of the Florida statute and is exempt from the certificate of need requirements of that law, we cannot say that such law in any way controls the Secretary [of Health, Education and Welfare] on the question of whether or not he will approve federal participation in capital expenditures on petitioner's project. . . .

Id. at 533. *See also Village of Herkimer v. Axelrod,* 451 N.Y.S. 2d 303, 307 (1982) where the New York Supreme Court stated:

> The [federal] act itself, however, negates any Congressional intent totally to preempt the field of health planning from the States (see U.S. Code, tit. 42, §300k[b], and as to unneeded health services, §300m-2[a][6]).

Federal Courts also consistently hold that health planning is a state law matter. In *Women's Community Health Center of Beaumont, Inc. v. Texas Health Facilities Commission,* 685 F. 2d 974, 980 (1982), the Fifth Circuit Court of Appeals observed:

> The Federal Act establishes the national health planning program as a joint federal-state effort. The state's interest in ensuring economical health care for its citizens is no less important than the federal government's interest. In recognition of the state's interest, the Federal Act gives the state government a central role in the administration of the health-care planning program within the state. In particular, the Federal Act "recognize[s] State certificate-of-need programs to be the basic component in an overall effort to control the unnecessary capital expenditures which contribute so greatly to the total national health bill." Health Planning and Resources Development Amendments of 1979, S.Rep.No.96, 96th Cong., 1st Sess.5, reprinted in [1979] U.S. Code Cong. & Ad. News 1306, 1310. The state alone is charged with enforcement of the certificate of need program.

See also, Wilmington United Neighborhoods v. United States Department of Health, Education, and Welfare, 615 F. 2d 112 (3rd Cir. 1980), *cert. den.* 449 U.S. 827 (1980), where the Third Circuit Court of Appeals, in construing a question under 42 U.S.C. §1122[7], stated:

> . . . we reject the appellant's underlying premise that the program is a "federal" one. All evaluations of the merits of health programs are conducted at the state and local level. . . . The regulations are not patterned to bring about a rigid federal uniformity. On the whole, it is clear that the state's role in health care planning was not to be supplanted.

The Court then examined the legislative history *of the Federal Health Planning Act* as further evidence that questions of health planning are state law matters.

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[7]42 U.S.C. §1122 is a part of the Social Security Act and is designed to reduce federal Medicare contributions for unneeded capital expenditures. Under the §1122 program (as with the capital Federal Act), the federal government offers federal funds to states to establish health planning programs within minimum bounds set out in the federal legislation.

An understanding of the true nature of the Federal Act thus demonstrates that this is entirely a state law matter and thus certiorari should be denied.

II. The Petition for Certiorari should be denied because the Arkansas Supreme Court's decision is based upon adequate and independent state grounds.[8]

It is basic Hornbook law that this Court will not review judgments of state courts which rest on adequate and independent state grounds. As this Court stated in *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945):

> This court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. [citations omitted] The reason is so obvious that it has rarely been thought to warrant statement.

Furthermore, this Court has repeatedly held that if there is any question as to whether a state court decision rests upon state or federal law, certiorari will not be granted. *Lynch v. People of New York, Ex Rel. Pierson*, 293 U.S. 52 (1934); *Buck v. People of State of California*, 343 U.S. 99 (1952), *reh. denied* 343 U.S. 932 (1952). In order for certiorari to lie, it must affirmatively appear that the state court rendering the decision must have decided a federal question and that such decision was essential to the disposition of the case. *Herb v. Pitcairn, supra.*

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[8]It is important to remember that there is only one issue here since the Arkansas Supreme Court clearly limited its decision to the question of whether the Arkansas Health Planning Development Agency could approve a Certificate of Need which is inconsistent with the State Health Plan, 280 Ark. at 445, 660 S.W.2d at 908. (Humana Appendix 2a).

The plain language of the Arkansas Supreme Court's decision reveals that it is based upon the Arkansas health planning law and regulations. In the introductory portion of the opinion, the Arkansas Supreme Court states:

> The protestants [respondents here] present several arguments for reversal, *but we need consider only one:* The State Agency was not authorized to grant a certificate of need that was inconsistent with the State Health Plan. On the record that argument must be sustained, which disposes of the case. (Emphasis added.)

280 Ark. at 445, 660 S.W.2d at 908. (Humana Appendix 1a, 2a). The Arkansas Supreme Court, after reviewing the overall regulatory scheme and the evidence before it, concluded:

> Thus it is established without substantial dispute that Humana's application for a 150-bed hospital in an area already overbedded is contrary to the Central Arkansas Health System's Plan and to the State Health Plan. *On this critical point the state agency's own Rule 4(d) requires that the State Health Plan be adhered to:*
>
> > 'Each decision of the State Agency (or the appropriate administrative or judicial review body) to issue a certificate of need must be consistent with the State Health Plan, except in emergency circumstances that pose an eminent threat to public health.'
>
> Despite this rule adopted by the agency itself, both that agency and the independent agency made what is denominated as a 'finding of fact,' though it contains only what is really a conclusion of law:
>
> > 'The application, while inconsistent with the need determinations of the health systems plan, is consistent with the goals, objectives and need determinations of the state health plan.'

> *There is no substantial evidence to support that finding....* (Emphasis added.)

280 Ark. at 448-449, 660 S.W.2d at 909-910, (Humana Appendix 4a, 5a). Since the clear language of the decision demonstrates that it is based upon Rule 4(d) of the Arkansas Health Planning Regulations, a state ground, Humana's Petition for Certiorari should be denied.

Humana has admitted that there are adequate and independent state grounds to support the Arkansas Supreme Court's decision. In the Jurisdictional Statement portion of its brief before the Arkansas Supreme Court, Humana stated, "This Court has jurisdiction pursuant to Rule 29(1)(c) of the Supreme Court." Rule 29(1)(c), Ark Stat. Ann. Vol. 3A (Repl. 1979), provides that the Arkansas Supreme Court has jurisdiction over:

> Cases, other than appeals from the Workman's Compensation Commission or from the Board of Review created by the employment Security Law, in which the validity, interpretation, construction or constitutionality of an act of the General Assembly, an act of the General Assembly, an ordinance of a municipality or county, or a rule or regulation of any court, administrative agency or regulatory body is in question; declaratory judgment actions pertaining to the validity or applicability of a rule of an agency subject to the Administrative Procedure Act under Ark. Stat. Ann. §55-705.

The real issue before the Arkansas Supreme Court, as Humana tacitly admitted, thus involved only the "interpretation [or] construction . . . of an act of the [Arkansas] General Assembly . . ., or a rule or regulation of . . . [an] administrative agency or regulatory body." Clearer adequate and independent state grounds are hard to imagine.

CONCLUSION

It is clear from the foregoing that this is a State law matter and, thus, Humana's Petition For Certiorari should be denied. Because this disposes of the case, Respondents have chosen not to reply to the points raised by Humana in its Petition. The Arkansas Statewide Health Coordinating Council, however, has responded appropriately to each of these points in its response brief and these Respondents adopt those responses as their own.

Respectfully submitted,

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APPENDIX A

ARKANSAS STATUTES ANNOTATED (1947)
CHAPTER 23

State Health Planning

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82-2307. *Creation of state health planning and development agency.* — There is hereby created and established the State Health Planning and Development Agency, hereinafter sometimes referred to as "the Agency". Such Agency shall be an independent agency under the supervision and control of the Governor. The State Health Planning and Development Agency shall be the sole and official agency of the State of Arkansas to administer and supervise the administration of the State's responsibilities pursuant to Public Law 93-641 and Public Law 96-79 of the United States and laws amendatory thereto, which Public Law is known as the "National Health Planning and Resources Development Act of 1974". The Agency is hereby authorized and empowered to exercise such duties and powers as shall be necessary for the implementation of Public Law 93-641 and Public Law 96-79 and laws amendatory thereto in the State of Arkansas. The Agency is hereby designated as the agency of this State to accept, receive, retain, and administer federal funds made available under the provisions of Public Law 93-641 and Public Law 96-79 and laws amendatory thereto. [Acts 1975, No. 558, § 1, p. 1553; 1981, No. 808, § 1, p. —.]

82-2308. *Appointment of director by governor.* — There shall be a Director of the State Health Planning and Development Agency who shall be the executive head of the Agency. The Director shall be appointed by the Governor subject to confirmation by the Senate, and shall serve

at the pleasure of the Governor. [Acts 1975, No. 558, § 2, p. —.]

82-2309. *Establishment of statewide health coordinating council — Members — Meetings — Compensation — Terms.* — (a) There is hereby established a Statewide Health Coordinating Council, hereinafter sometimes referred to as "the Council" to advise and assist the State Health Planning and Development Agency in carrying out the provisions of this Act. The Council is hereby authorized and empowered to exercise such duties and powers as are prescribed for Statewide Health Coordinating Councils in Public Law 93-641 and Public Law 96-79 and laws amendatory thereto.

(b) The Council shall be composed of not more than thirty-six (36) members who shall be appointed by the Governor in accordance with the provisions of Public Law 93-641 and Public Law 96-79 and laws amendatory thereto.

(c) The Council shall, in addition to the appointed members, include as an ex officio member an individual whom the Chief Medical Director of the Veterans' Administration shall have designated as a representative of the Veterans' Administration.

(d) The Governor may select by and with the advice and consent of the State Senate, the chairman of the Council. The Governor may select one or more vice chairmen. If the Governor does not choose to select officers, the Council shall select the chairman and one or more vice chairmen from among its members at the time of its annual meeting.

(e) The Council shall conduct all of its business meetings in public and shall meet at least once in each calendar quarter of a year.

(f) Members of the Council shall serve without pay, but shall receive actual expenses incurred for attendance at meetings of the Council.

(g) The Governor shall have the power to stagger the terms of the members so that one-third [1/3] thereof may be appointed for an original term of one (1) year, one-third [1/3] for an original term of two (2) years, and one-third [1/3] for an original term of three (3) years, with all subsequent appointments to be for terms of three (3) years. [Acts 1975, No. 558, § 3, p. 1553; 1981, No. 808, § 2, p. —.]

• • • • •

82-2310. *Preparation and development of plan by agency.* [*Repealed.*]

• • • • •

82-2311. *Certificates of need.* — (a) The State Health Planning and Development Agency, with the advice, consent and approval of the Statewide Health Coordinating Council is hereby authorized and directed to implement the below described Certificate of Need Program in this State.

(b) Prior to the construction, expansion or alteration of any hospital or health care facility, excluding physicians' offices unless subject equipment is used for in-patient services, increasing bed capacity, or adding major new facilities or categories of service, or changing license classifications, a certificate-of-need shall be obtained from the State Health Planning and Development Agency. The decreasing of bed capacity or termination of a health service requires a certificate-of-need if associated with a capital expenditure or if the operating budget of a service

being terminated exceeds seventy-five thousand dollars ($75,000.00) annually or exceeds any future threshold established by HHS. The application for a certificate-of-need shall be submitted to the Agency on forms provided for this purpose. The application for a certificate-of-need shall include such information as necessary to determine:

(1) Whether the proposed project is needed or projected as necessary to meet the needs in the community in terms of health services required;

(2) Whether the proposed project can be adequately staffed and operated when completed;

(3) Whether any proposed project is economically feasible;

(4) Whether the project will foster cost containment through improved efficiency and productivity;

(c) The Agency with the advice of the Council may adopt criteria defining "major new facilities or categories of services" for purposes of this Section and exempting certain categories of medical facilities or services from the application of this Section in view of the specialized or limited nature of the services rendered, or proposed to be rendered, or on the basis of other criteria which it may adopt by rule.

(d) The Agency shall issue a certificate-of-need as it finds that the proposed project requiring approval is reasonably necessary to provide health care to the defined population in a manner which is economically practicable, which maintains high quality standards, and which is appropriate to the timely and economic development of adequate and effective health services in the area. In making

such determination, the Agency shall take into consideration:

(1) Recommendations of the appropriate Health Systems Agency(s).

(2) The relationship of the proposal to the Health Systems Plans and the State Health Plan.

(3) The need for health care services in the area or the requirements of the defined population.

(4) The availability and adequacy of health care services in facilities which are currently serving the defined population and which conform to State standards.

(5) The need for special equipment and services in the areas which are not reasonably and economically accessible to the defined population.

(6) The need for research and educational facilities.

(7) The probable economics and improvement in service that may be derived from the operation of joint central services or from joint, cooperative, or shared health resources which are accessible to the defined population.

(8) The availability of sufficient manpower in the professional disciplines required to maintain the facility.

(9) The plans for and development of comprehensive health services and facilities for the defined population to be served. Such services may be either direct or indirect through formal affiliation with other health programs in the area and shall include preventive, diagnostic, treatment, and rehabilitation services.

(10) Whether or not the applicant has obtained all relevant approvals, licenses or consents required by law for its incorporation or establishment.

(11) The needs of members, subscribers and enrollees of institutions and health care plans which operate or support particular hospitals for the purpose of rendering health care to such members, subscribers and enrollees.

(12) In the case of an application by a hospital established or operated by a religious body or denomination, the needs of the members of such religious body or denomination for care and treatment in accordance with their religious or ethical convictions may be considered to be public need.

(13) The proposed facility will be adequately funded.

(e) Projects requiring approval shall not be instituted or commenced after the effective date [March 25, 1975] of this Act except upon application for and receipt of a certificate-of-need as provided herein: provided, that in any case in which prior to the effective date of this Act, there has been proposed the expansion of an existing facility and preliminary plans have been submitted to the Agency, the Agency may waive all or any portion of the review process, and said facility may proceed with its plans in an orderly and expeditious manner. Any projects requiring approval which have, prior to the effective date of this Act, been approved by the Agency for Capital Expenditure Review purposes, are automatically approved for certificate-of-need.

(f) In the administration of this Act, consideration shall be given to the efficiency of the utilization of an existing health facility which is or will be serving the defined population to be served by a proposed new health facility or expansion of an existing health facility so as to avoid unnecessary duplication of facilities and to encourage maximum efficiency in the use of the facilities which then serve or will be serving the defined population.

(g) "Defined population" as used in this Section means the population that is or may reasonably be expected to be served by an existing or proposed facility. "Defined population" shall also include persons who prefer to receive the services of a particular recognized school or theory of medical care. "Defined population" shall not be limited to a geographical area.

(h) If the Designated Planning Agency finds that a project application complies with the requirements of Sections 4 and 5 of this Act and is otherwise in conformity with the State Plan, it shall approve such application and shall recommend and forward it to the appropriate State licensing agency. The Agency by regulation shall provide an opportunity for fair hearing and appeal to every applicant or Health Systems Agency which is dissatisfied with any action regarding an application.

(i) No license shall be issued or renewed for any hospital, or health care facility, excluding physicians' offices unless subject equipment is used for in-patient services, which has been constructed, expanded, or altered in a manner subject to this Act unless a certificate-of-need has first been issued therefor pursuant to this section. This requirement will not be construed to prohibit the issuance of a license for existing facilities or services that satisfy existing licensing requirements and for which a license has been previously issued, provided that construction of additional patient beds to reach licensed capacity shall require a certificate of need. The Agency is empowered to enjoin the construction or change in service as indicated in Section 4(b) of any project commenced in violation of this Act through an action filed in the Chancery Court of

Pulaski County, Arkansas or the Judicial District in which the project is located. [Acts 1975, No. 558, § 5, p. 1553; 1981, No. 808, § 3, p. —.]

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82-2312. *Powers of agency.* — In carrying out its duties hereunder the Agency is empowered to:

(a) Make application for and accept funds from the Secretary of the Department of Health and Human Services for conducting its operations;

(b) With the approval of the Governor, and the head of the affected department, division, or agency, delegate or contract out to any department, or agency of the State, responsibility for administering any programs or duties provided for in this Act.

In this regard, unless otherwise directed by the Governor, the Office of Regulation and Licensure of the Department of Health and the Office of Long Term Care of the Department of Human Services shall administer the grants and loans program under Title 16 of the Public Health Services Act and under Public Law 93-621 and Public Law 96-79.

(c) Hold hearings and to prescribe and promulgate such reasonable rules and regulations as may be necessary to implement this Act. In the promulgation, implementation and application of rules and regulations, the State Health Planning and Development Agency shall comply with Act 434 of 1967 [§§ 5-701-5-714], "The Arkansas Administrative Procedure Act", as it is or may hereafter be amended.

(d) The State Health Planning and Development Agency is the designated State Agency to receive and analyze health statistics for health planning in the State of Arkansas. [Acts 1975, No. 558, § 6, p. 1553; 1981, No. 808, § 4, p. —.]

• • • • •

82-2313. *Transfer of powers.* — All the powers, duties and functions of the Comprehensive State Health Planning Agency set forth in Act 305 of 1969 [§§ 82-2301-82-2306] are hereby transferred by Type 1 transfer to the State Health Planning and Development Agency. The powers, duties and functions of the State Health Planning Council set forth in Act 305 of 1969 are hereby transferred by Type 1 transfer to the Statewide Health Coordinating Council, and the State Health Planning Council shall become the initial Statewide Health Coordinating Council. [Acts 1975, No. 558, § 7, p. 1553; 1981, No. 808, § 5, p. —.]

• • • • •

82-2313.1 *Expiration of act.* — The provisions of Act 558 of 1975, as amended, the same being Arkansas Statute 82-2301 and following, shall automatically expire on the expiration or termination of the National Health Planning and Resources Development Act of 1974 [42 U.S.C. §§ 300k — 300s], as amended, or in the event the programs instituted pursuant to such Act cease to function. [Acts 1981, No. 808, § 7, p. —.]

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APPENDIX B

[ARKANSAS] STATE HEALTH PLAN

June, 1980
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§ 121.201 - General Hospitals - Bed Supply

(a) Standard. There should be less than four non-Federal, short stay hospital beds for each 1,000 persons in a health service area except under extraordinary circumstances. For purposes of this section, short-stay hospital beds include all non-Federal short-stay hospital beds (including general medical/surgical, children's, obstetric, psychiatric, and other short-stay specialized beds). Conditions which may justify adjustments to this ratio for a health service area include:

(1) Age: Individuals 65 years of age and older have a higher hospital utilization rate - up to four times that of the general population - than any other age group. Bed-population ratios for health service areas in which the percentage of elderly people is significantly higher (more than 12% of the population) than the national average may be planned at a higher ratio, based on analyses by the HSA.

(2) Seasonal population fluctuations: Large seasonal variations in hospital utilization may justify higher ratios. Plans should reflect vacation and recreation patterns as well as the needs of migrant workers and other factors causing unusual seasonal variations.

(3) Rural areas: Hospital care should be accessible within a reasonable period of time. For example, in rural areas in which a majority of the residents would otherwise be more than 30

minutes travel time from a hospital, the HSA may determine, based on analyses, that a bed-population ratio of greater than 4.0 per 1,000 persons maye be justified.

(4) Urban areas: Large numbers of beds in one part of a Standard Metropolitan Statistical Area (SMSA) may be compensated for by fewer beds in other parts of the SMSA. Health service areas which include a part of an SMSA may plan for bed-population ratios higher than 4.0 per 1,000 persons reflecting existing patterns if there is a joint plan among all HSAs serving the SMSA which provides for less than 4.0 beds per 1,000 persons in the SMSA as a whole.

(5) Areas with referral hospitals: In the case of referral institutions which provide a substantial portion of specialty services to individuals not residing in the area, the HSA may exclude from its computation of bed-population ratio the beds utilized by referred patients who reside outside both the SMSA and the HSA in which the facility is located.

§ 121.303 - General Hospitals - Occupancy Rate

(a) Standard. There should be an average annual occupancy rate for medically necessary hospital care of at least 80% for all non-Federal short-stay hospital beds considered together in a health service area except under extraordinary circumstances. Conditions which may justify an adjustment to this standard for a health service area include:

(1) Seasonal population fluctuations: In some areas, the influx of people for vacation or other purposes may require a greater supply of hospital beds than would otherwise be needed. Large seasonal variations in hospital utilization which can be predicted through hospital and health insurance records may justify an average annual occupancy rate lower than 80% based on analyses by the HSA.

(2) Rural areas: Lower average annual occupancy rates are usually required by small hospitals to maintain empty beds to accommodate normal fluctuations of admissions. In rural areas with significant numbers of small (fewer than 4,000 admissions per year) hospitals, an average occupancy rate of less than 80% may be justified, based on analyses by the HSA.

APPENDIX C

Health Service Area III [Central Arkansas]
1986 [SHCC] Acute Care Bed Need Determinations
[included by reference as a part of the
Arkansas State Health Plan]

The following information is based on the acute care bed need guidance and methodology (1981) and the 1986 population projections. Where a need is less than the current licensed and approved beds exists for a service area, a recommendation to delicense beds is not necessarily intended.

1. Faulkner Service Area:
   116 licensed beds/0 approved
   1986 Bed Need is 136
2. Monroe Service Area:
   40 licensed beds/0 approved
   1986 Bed Need is 16
3. Rebsamen Service Area:
   75 licensed beds/38 approved
   1986 Bed Need is 106
4. Riverview Service Area:
   125 licensed beds/0 approved
   1986 Bed Need is 57

5. Children's Service Area:
117 licensed beds/43 approved
1986 Bed Need is 160

Note: This need is not based on the methodology. As a result of the special services provided to the State's population and the admission restriction to children under 21 years of age, it is determined that the 1986 bed need for this facility be established at 160. Further analysis will be conducted for this service area hospital.

6. Memorial Service Area:
260 licensed beds/0 approved
1986 Bed Need is 214

7. Central Baptist Service Area:
80 licensed beds/0 approved
1986 Bed Need is 80

Note: This need is not based on the methodology. As a result of the special services provided at this facility which requires length of stay longer than the average for the State as a whole, it is recommended that the 1986 bed need be established at the current acute care licensure. Further analysis will be conducted for this service area hospital.

8. Little Rock Service Area:
1,543 licensed beds/130 approved
1986 Bed Need is 1,818

Note: This service area includes three hospitals (St. Vincent's Infirmary, Doctor's Hospital, and Baptist Medical Center). These three hospitals were grouped as a result of their comparative level of sophistication of services, their common statewide service area population base, and geographic proximity.

9. University Service Area:
400 licensed beds/0 approved
1986 Bed Need is 400

Note: The need is not based on the methodology. University hospital was not grouped in the Little Rock service area because the service area is statewide (no more than 10% of the hospital's service area population comes from any one county), the patients served by hospital are often unable to pay for services, and it is a state-operated teaching facility. Based on these considerations, it is determined that the 1986 bed need for this facility be established at 400.

10. Saline Service Area:
    147 licensed beds/0 approved
    1986 Bed Need is 123

11. Lonoke Service Area:
    0 licensed beds/15 approved
    1986 Bed Need is 15

Note: The need was not based on the methodology and patient origin data is not available to determine the service area population base.

Adopted November 1981

APPENDIX D

POLICIES, PROCEDURES, AND CRITERIA FOR CERTIFICATE OF NEED REVIEW CAPITAL EXPENDITURE REVIEW AND NEW INSTITUTIONAL HEALTH SERVICES REVIEW

Arkansas Health Planning and Development Agency
4815 West Markham
Little Rock, Arkansas
March, 1981

Rule 1. DESCRIPTION

The State Health Planning and Development Agency (SHPDA or State Agency) is the State Agency designated by Arkansas Act 558 of 1975 as amended by the Secretary of HHS to conduct the health planning activities of the State and implement those parts of the State Health Plan and the plans of the health systems agencies within the State which relate to the government of the State. The State Agency serves as the Designated Planning Agency of the State for the purposes of Section 1122 of the Social Security Act, and administers the State Certificate of Need Program mandated by P.L. 93-641 and P.L. 96-79.

The State and Federal laws referred to above require the SHPDA to administer a State Certificate of Need Program which applies to the obligation of capital expenditures within the State, the offering within the State of new institutional health services, and the acquisition of major medical equipment. The SHPDA will review and make findings on proposed projects subject to Certificate of Need Review, prior to the time: i) capital expenditures are obligated, ii) the addition or deletion of institutional health services is offered, and iii) the acquisition of major medical equipment is undertaken. Only those institutional health services, capital expenditures, and major medical equipment found to be needed will be approved.

The purpose of these reviews is to implement those health plans which prevent wasteful duplication of facilities and services as a means to help contain the cost of health care. The reviews will seek to assure needed services and facilities are developed where appropriate. The reviews will encourage development of alternative organizations for delivery of care.

In the performance of its functions, the State Agency acts with the advice, consent, and approval of the Statewide Health Coordinating Council (SHCC) appointed by the Governor.

Rule 2. DEFINITIONS

[omitted]

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Rule 3. PURPOSE AND APPPLICABILITY

a. The Arkansas State Health Planning and Development Agency (State Agency) will administer a State Certificate of Need Program which: (1) applies to the obligation of capital expenditures within the State, the offering within the State of new institutional health services, and the acquisition of major medical services, and the acquisition of major medical equipment and 2) is consistent with regulations of the Secretary.

b. In performing its review functions, the State Agency shall (except to the extent approved by the Secretary) follow procedures and apply criteria developed and published by the State Agency in accordance with regulations of the Secretary.

Rule 4. GENERAL

a. The State Agency will administer within the State a Certificate of Need Program.

b. Only the State Agency (or the appropriate administrative or judicial review body) will issue, deny or withdraw certificates of need, grant exemptions from certificate of need reviews, or determine that certificate of need reviews are not required.

c. In issuing or denying certificates of need or in withdrawing certificates of need, the State Agency will take into account recommendations made by the State's health systems agencies.

d. Each decision of the State Agency (or the appropriate administrative or judicial review body) to issue a certificate of need must be consistent with

the State Health Plan, except in emergency circumstances that pose an imminent threat to public health.

e. Each decision of the State Agency to issue, deny, or withdraw a certificate of need must be based on: (1) a review by the State Agency conducted in accordance with its adopted procedures and criteria and (2) the record of the administrative proceedings held on the application for the certificate or the State Agency's proposal to withdraw the certificate. Each decision of the State Agency to grant or deny an exemption will be made in accordance with the State Agency's procedures for reviewing applications for exemptions and will be based solely on the record of the administrative proceedings held on the application.

Rule 5 - Rule 16. [omitted]

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APPENDIX E

EXCERPT FROM HUMANA'S LATEST CON APPLICATION

On August 5, 1982 the Arkansas Health Planning and Development Agency issued a Certificate of Need (CON) to General Hospitals of Humana Inc. to build a 150 bed hospital in Sherwood, Arkansas for approximately $23,380,000. On October 24, 1983 the Arkansas Supreme Court reversed the decision to issue the CON. Humana is seeking to have the United States Supreme Court review this decision by petition for writ of certiorari. Should a new Certificate of Need be issued before action is taken by the U.S. Supreme Court Humana shall treat the new Certificate as

superceding the old one and refrain from any further action to implement the August, 1982 CON.

On October 26, 1983 Humana halted all construction on the Sherwood hospital because of the Arkansas Supreme Court Action. Humana has already paid approximately $8,000,000 for the site and the partially completed building in Sherwood. The net effect is to request approval of approximately $16,000,000 in new costs on this CON to complete the facility.

Page 1 of 40 from Humana's January 13, 1984 application.

APPENDIX F

SUPREME COURT OF ARKANSAS

No. 83-83

Statewide Health Coordinating Council, *et al.*,

Respondents,

vs.

General Hospitals of Humana, Inc., *et al.*,

Petitioners.

EXCERPT FROM HUMANA PETITION FOR REHEARING

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j. The Court erred 1) in divesting the State Agency of its decision-making role in Certificate of Need matters contrary to state and federal law and 2) in applying a national standard which was originally adopted for the purpose of assisting health planners in developing state and local health plans as an absolute mandate and certificate of need decisions *See,* 42 C.F.R. §121.2. By its decision the Court has removed discretion in Certificate of Need matters from the State Agency contrary to the federal directive that the state should designate a single state agency to process Certificate of Need matters. *See,* 42 U.S.C. §300m. By doing so, the Court has endangered all federal funding for health planning in the State of Arkansas.